The Rationality Requirement of the Equal Protection Clause

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I. TOWARDS A MEANS-FOCUSED JUDICIAL REVIEW OF LEGISLATIVE CLASSIFICATIONS

A. *Introduction*

This Article discusses the rationality requirement of the Equal Protection Clause[1] as applied by the Supreme Court of the United States. Although the rationality requirement has come under increasing attack by scholars,[2] it has been used by the Supreme Court as *the* test in equal protection cases for over a century.[3] The rationality requirement permits a court to intercede on behalf of a litigant challenging the constitutionality of a statute if the court determines that the challenged disadvantageous classification is not rationally related to a legitimate governmental interest. The purpose of the rationality requirement is to prevent arbitrary discrimination.[4]

In part I of this Article I will briefly trace the evolution of the Court's equal protection doctrine in order to point out how it began as a relatively modest, somewhat ends-oriented method of analysis[5] and developed into "toothless scrutiny"[6] in economic regulation cases until the Burger Court

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1. This Article discusses the minimum standard of judicial review that is applicable if legislation is challenged under the Equal Protection Clause of the fourteenth amendment. There is no extensive discussion of strict scrutiny, the intermediate level of scrutiny, or the sliding scale approach. The focus is on the Court's most deferential equal protection standard. This Article does not discuss the minimum standard of review that is applicable when legislation is challenged under the Due Process Clause. For an extremely valuable and more general discussion of the rationality requirement, see Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980) [hereinafter cited as Bice].

2. *See, e.g.*, Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) [hereinafter cited as Linde]; Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979) [hereinafter cited as Perry].

3. *See* Missouri v. Lewis, 101 U.S. 22 (1879).

4. *Id.* at 29–33. In Jones v. Helms, 101 S. Ct. 2434 (1981), the Court reiterated the familiar principle that "[t]he Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way." *Id.* at 2442 (footnotes omitted). The Court cited the statement made by Senator Howard in the Senate debate preceding the adoption of the fourteenth amendment to illuminate the scope of the guarantee:

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . . It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government as I understand it, and the only one which can claim the praise of a Just Government.

Id. at 2442 n.23 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)).

5. *See* text accompanying notes 27–37 *infra*.

6. *See* text accompanying notes 38–48 *infra*.

managed to put a little more bite into the means-focused aspects of the rationality requirement.[7] Part I culminates with a dicussion of three significant cases decided during the 1980 Term,[8] namely, *Schweiker v. Wilson*,[9] *Minnesota v. Clover Leaf Creamery Co.*,[10] and *United States Railroad Retirement Board v. Fritz*.[11] These recent cases disclose that several Justices are no longer prepared to defer excessively to the legislature's classifications when the legislature does not identify its purposes. This is a significant shift, a departure from the minimum rationality test of the Warren Court period, which amounted to a meaningless ritual.

In part II, I argue that the rationality requirement, properly understood, does not apply in every equal protection case. There are occasions when the legislature should have discretion to indulge in unalloyed favoritism or antipathy towards certain groups that are singled out by the elected representatives.[12] Accepting some of the legislature's biases, I argue, is a lesser evil than hypothesizing some legitimate purpose not considered by the legislature in order to justify classifications that discriminate against certain groups.[13] The Court often should condone the legislature's biases, which are understandable as expressions of taste, aesthetics,[14] or inarticulable evaluations of worth. Many biases are not amenable to evaluation by a rationality test. Unless the Court exercises restraint in such situations, it will be substituting *its* tastes, and imposing *its* likes and dislikes on elected legislators who should be representative, which is not the same as impartial.[15] Most legislative classifications, however, should be subjected to meaningful but deferential scrutiny under the rational basis test, which I refer to as the rationality requirement.

Tussman and tenBroek's seminal article[16] describes how the rationality requirement came to be used as an intermediate premise[17] designed by the judiciary to implement the Equal Protection Clause. Laws classify, they remind us, and the very idea of classification is that of inequality.[18] "In tackling this paradox the Court has neither abandoned the demand for equal-

7. *See* text accompanying notes 49–73 *infra*.

8. *See* text accompanying notes 74–176 *infra*.

9. 101 S. Ct. 1074 (1981).

10. 449 U.S. 456 (1981).

11. 449 U.S. 166 (1980).

12. *See* text accompanying notes 190–99 *infra*.

13. *See* text accompanying notes 193–219 *infra*.

14. *See* text accompanying notes 214–15 *infra*. In Metromedia, Inc., v. City of San Diego, 101 S. Ct. 2882 (1981), the Court in a first amendment case involving commercial speech discussed in instrumental terms the extent to which a restriction on billboard advertising directly advanced a city's interests in aesthetics. It is awkward, if not always inappropriate, for a court to apply instrumental tests, like the rationality requirement, to determine which classifications do or do not contribute to beauty.

15. Fullilove v. Klutznik, 448 U.S. 448 (1980) (Powell, J., concurring).

16. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) [hereinafter cited as Tussman & tenBroek].

17. Mediating principles are derived from the Constitution's general principles and "give meaning and content to an ideal embodied in the text." Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107, 107 (1976) [hereinafter cited as Fiss].

18. Tussman & tenBroek, *supra* note 16, at 344; *see also* Martin v. City of Struthers, 319 U.S. 141, 154 (1943) (Frankfurter, J., dissenting).

ity nor denied the legislative right to classify. It has taken a middle course."[19] The Court insists on a reasonable classification. The essence of the concept, "reasonable classification," is "that those who are similarly situated [must] be similarly treated."[20] In order to decide if persons or classes are similarly situated, it is necessary to look to the purpose of the law.

Once the purpose of the law is ascertained, the Court returns to the classification to decide if it is reasonable. The essence of a classification is the legislature's use of a trait selected as a proxy for an individual's characteristics or tendencies. Statutory classifications eliminate the need for case by case determinations. Thus, age sixteen is a trait used in a statute to denote an individual's immaturity and inability to drive safely. Although use of a classification is thought to be more efficient than a series of individualized determinations, almost all classifications are overinclusive or underinclusive.[21] In other words, the use of a trait as a proxy usually is an inaccurate generalization.[22] To the extent that the legislature's target group is immature motor vehicle operators unable to drive safely, its classification is underinclusive since not all such operators are under age sixteen; to the extent that some juveniles burdened by the statute are mature enough to drive safely, the classification is overinclusive. If the Court decides that the classification is intolerably overinclusive or underinclusive and therefore unacceptably imprecise, it will sustain a challenge based on equal protection principles.[23]

There are many problems associated with the rationality requirement. One ever-present danger is judicial usurpation of the legislative role. In this regard, the Supreme Court has always recognized that the Equal Protection Clause is not

> designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.[24]

Moreover, the Equal Protection Clause does not forbid all discrimination among persons or classes,[25] nor does it prohibit "[s]pecial burdens . . . often necessary for general benefits."[26]

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19. Tussman & tenBroek, *supra* note 16, at 344.

20. *Id.*

21. A classification "could be overinclusive (it picked out more persons than it should) or underinclusive (it excluded persons that it should not)." Fiss, *supra* note 17, at 111.

22. "Whether a classification *actually* serves the governmental interest is a question of fact. Because legislatures are generally more competent to resolve complex empirical questions than courts, the Supreme Court insists only that the empirical judgment implicit in the legislature's use of the classification—namely, that the classification will or might serve the governmental interest—be rational or plausible."

Perry, *supra* note 2, at 1068 n.232 (citation omitted).

23. Whether a classification is overinclusive or underinclusive, or intolerably imprecise, is a question of degree requiring judicial judgment. The courts recognize, however, that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69 (1913).

24. Barbier v. Connolly, 113 U.S. 27, 31 (1885).

25. Missouri v. Lewis, 101 U.S. 22 (1879).

26. Barbier v. Connolly, 113 U.S. 27, 31 (1885).

B. *Towards Meaningful Judicial Review, Neither Unduly Deferential nor Intrusive*

Although the Equal Protection Clause is not a warrant to usurp the legislative function, some early formulations of the rationality requirement were not toothless. In *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*,[27] the Court invalidated a statute that required railroad companies to pay the attorney fees of successful plaintiffs after explaining the classifications "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily."[28] In accordance with the rationality requirement, the Court emphasized that a classification could be arbitrary for some legislative purposes, but not others. Thus, a railroad company may be regulated peculiarly if it creates peculiar safety hazards,[29] but it may not be isolated when the state simply aims to prevent unnecessary litigation. No difference between railroad companies and other companies justifies this special restriction.[30] Perhaps the legislature believed that the railroads were unfairly forcing injured plaintiffs to litigate. The Court refused, however, to entertain this possibility in the absence of evidence and held that the challenged statute violated the Equal Protection Clause.

During the early twentieth century, the Court was torn between its desire to supervise the states' exercise of the police power and its professed desire not to displace the legislature's judgment. The solution was to place the burden of persuasion on the challenger in an equal protection case. The Court required one who assailed a classification to "carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[31] By 1920, however, a rationality standard had evolved that insisted that the means selected have a real and substantial relation to the object sought to be obtained.[32] An elaborate statement of equal protection principles was articulated by Chief Justice Taft in *Truax v. Corrigan*.[33] In *Truax*, the Court invalidated a state law which specifically exempted ex-employees, when committing tortious and irreparable injury to the business of their former employer, from restraint by injunction. The law left subject to such restraint all other tortfeasors engaged in like wrongdoing. Chief Justice Taft wrote that classifications "must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose at hand."[34] He went on to say that classifications like the one challenged in *Truax* cannot be upheld as legalized experiments in sociology

27. 165 U.S. 150 (1897).
28. *Id.* at 155.
29. *Id.* at 157–58.
30. *Id.* at 159.
31. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911) (citations omitted).
32. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
33. 257 U.S. 312 (1921).
34. *Id.* at 338.

because the very purpose of the Constitution was to prevent experimentation with the fundamental rights of the individual.[35] Justice Brandeis, dissenting, complained that the Court ignored the facts which justified the legislature's distinction. Pointing out that "[r]esort to . . . facts is necessary . . . in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed,"[36] Justice Brandeis, as he so often did, admonished the Court "not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law."[37]

During the first third of the twentieth century, it became increasingly evident that the Supreme Court could not resist substituting its subjective judgment for that of the legislature in the name of the rationality requirement. Built into the rationality requirement is an invitation for courts to engage in an intrusive ends inquiry, and when courts accept this invitation, they read into the Constitution their own notions of public policy. After 1937, the Supreme Court recognized the error of its ways. Although the most objectionable abuses of judicial power had occurred in connection with the doctrine of substantive due process, the Justices also became highly deferential to legislative judgment when a statute was assailed under the Equal Protection Clause.

During the mid-twentieth century, the judiciary adopted a stance that made challengers relying on equal protection principles dread the thought of what had become "minimum rationality." Under one frequently repeated formulation of the rational basis test, "statutory classifications will be set aside only if no grounds can be conceived to justify them,"[38] and will not be set aside "if any state of facts reasonably may be conceived to justify" the discrimination.[39] In cases involving state regulation of business practices, mere administrative convenience justified discrimination.[40] Thus, the means scrutiny of the Court was rendered impotent. Under the Warren Court's extremely deferential formulations, statutory classifications were invalidated only if shown to be "based on reasons *totally unrelated* to the pursuit"[41] of some conceivably legitimate end—whether or not that end was in fact considered by the legislature.[42] In other words, "If no facts could reasonably be conceived to make legislation a rational way to serve its actual purpose, an imagined purpose would surely suffice."[43] Thus, the ends scrutiny component of the rationality requirement was eliminated, and means scrutiny imposed no real constraint.

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35. *Id.*
36. *Id.* at 356–57.
37. *Id.* at 357.
38. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).
39. McGowan v. Maryland, 366 U.S. 420, 426 (1961).
40. *Id.* at 427–28.
41. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (emphasis added).
42. *See* Flemming v. Nestor, 363 U.S. 603, 612 (1960).
43. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1057 (1979) [hereinafter cited as Bennett].

Owing to the Court's abdication, the rationality requirement for decades became "largely inconsequential as a constraint on the power of governments."[44] There is no way to challenge a classification successfully if a court is ready, willing, and eager to invent a means-end fit, even when the government does not introduce evidence to rebut a challenger's *prima facie* case, files no Brandeis brief, and does not articulate its ends.[45] The Court in such cases shirks its duty by supplying the missing end. It has become commonplace to note that the Court went from the extreme of inconsistent, unprincipled hyperactivism to the extreme of excessive deference. It failed to establish "a halfway house between the extremes, retaining a measure of control over economic legislation but exercising that control with discrimination and self-restraint."[46]

To illustrate the challenger's insurmountable burden, suppose a statute prohibits cigarette smokers from operating automobiles. If the Court assumes the goal is traffic safety, the challenger could introduce statistics showing the law is 99.9% overinclusive, but the "totally unrelated" standard *literally* requires the challenger to show that the law is 100% overinclusive. Even if the challenger could show that all nonsmokers are in fact more accident prone, he or she will still lose the case because then the Court is free to hypothesize that the legislature's goal is the prevention of litter. In short, as Professor Bennett has said, the rationality requirement became "a convenient, if vacuous, label that the Court could apply when it felt compelled to say something about why legislation was constitutionally permissible."[47] At times, the Court did not even bother to discuss means scrutiny[48] because the outcome was always preordained.

In a thoughtful and influential article,[49] Professor Gunther encouraged the Court to reconsider the approach of Justice Jackson, who regarded the rationality requirement "as a salutary doctrine"[50] less intrusive than substantive due process. Justice Jackson would scrutinize the challenged classifications to determine whether governments discriminated against their inhabitants with "some reasonable differentiation fairly related to the object of the regulation."[51] Gunther sketches a model that once again "would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases."[52] The model would have courts determine

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44. Perry, *supra* note 2, at 1070.

45. It is still an open question whether a court may dismiss an equal protection challenge "on the pleadings or grant summary judgment for the state on the basis of the legislative history, without hearing the challenger's evidence." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 n.8 (1981).

46. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 41.

47. Bennett, *supra* note 43, at 1056.

48. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

49. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

50. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

51. *Id.* at 112.

52. Gunther, *supra* note 49, at 20.

under relatively vigorous scrutiny whether the challenged government classification had a "substantial relationship to legislative purposes."[53] The model does not tolerate gross overinclusiveness or underinclusiveness,[54] and it demands a plausible fit between the classification and the articulated purposes. Gunther realizes that the Court cannot meaningfully or intelligently apply the rationality requirement if it continues to strain for any conceivable justification for a challenged classification.[55] His model therefore requires the courts to "assess the rationality of the means in terms of the *state*'s purposes, rather than hypothesizing conceivable justifications on its own initiative."[56] Moreover, there would be a greater burden on the state to come forth with explanations indicating how the classification relates to the legislatively chosen ends,[57] together with "at least some evidence that the state [has] thought about [its] rationale."[58]

In *Vance v. Bradley*,[59] the Court chose to elaborate upon the nature of the challenger's burden. Appellees had challenged section 632 of the Foreign Service Act of 1946,[60] which requires persons covered by the Foreign Service retirement system to retire at age sixty. No similar mandatory retirement age was established for Civil Service employees who serve abroad. The appellee had the burden of demonstrating that Congress had no reasonable basis for believing that (1) conditions overseas generally are more demanding than those in this country, or that (2) no risks of less than superior performance are incurred when persons over age sixty serve overseas in the foreign service. The challengers did not shoulder their burden; reasonable persons could draw different inferences from the evidence presented. Therefore, the classification could not be deemed lacking in rationality. The Court explained that the challenger would have to present evidence indicating that the legislative facts forming the basis for the classification were so demonstrably unreliable that no reasonable person could conceive them to be valid.[61] Although this is a heavy burden indeed, Justice White, who wrote the Court's opinion, argued in another case decided during the same term that other challengers had in fact shouldered their burden of proof.[62] The Court's current elaboration of the challenger's burden does not seem at first blush to be much of a change from the "totally unrelated" test, but the tone of the Court's message, as I understand it, is that the challenger at least has an opportunity to prevail if he or she has an exceptionally strong case. This is a different signal from that which had been coming from the Court. The usual signal flashed by the Court in

53. *Id.*
54. *Id.*
55. *Id.* at 33.
56. *Id.* at 46.
57. *Id.* at 44.
58. *Id.* at 45.
59. 440 U.S. 93 (1979).
60. 22 U.S.C. § 1002 (1976).
61. 440 U.S. 93, 110–12.
62. New York City Transit Auth. v. Beazer, 440 U.S. 568, 601–02 (1979) (White, J., dissenting).

Williamson v. Lee Optical Co.,[63] *McGowan v. Maryland*,[64] and *McDonald v. Board of Election Commissioners*[65] was that the Court is not interested in reviewing social and economic legislation challenged on equal protection grounds. The recent signal, however faint, is that the Equal Protection Clause imposes a real constraint on legislative classifications.

The majority of the Justices on the Burger Court still often take a stance more deferential than the Gunther model. *New York City Transit Authority v. Beazer*[66] illustrates the point. The transit authority refused to employ persons attempting to break the heroin habit, and perhaps also those who had broken the habit.[67] Plaintiffs, who were successfully maintaining a methadone program of rehabilitation, sued the authority and prevailed in the district court. The district court judge found the transit authority could not have reasonably concluded that successfully maintained methadone users are "less employable than the general population"[68] because many of the jobs presented no safety risks. Justice White, dissenting, agreed with the lower court judge that it was not rational to exclude every person in this group without regard to job description.[69] In some respects, Justice Powell also agreed with the lower court's conclusion that "there is no rational basis for an absolute bar against the employment of persons who have completed successfully a methadone maintenance program and who otherwise are qualified for employment."[70]

The Court, however, reversed the judgment for the plaintiffs and upheld the overinclusive classification. Justice Stevens explained: "Because it does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority."[71] Thus, according to *Beazer*, the Court is persisting in its policy of rubberstamping classifications unless a majority suspects that owing to prejudice some politically powerless group is not getting a fair shake from the political process. One should not conclude, however, that the rationality requirement is forever frozen in the *Beazer* mold. Notions of equal protection *do* change.[72] As the pressures increase to aid the mentally ill, the handicapped, the aged, and other groups who are victims of stereotyping by an unthinking ruling majority, there will be an incentive to adopt an across-the-board rationality requirement with more bite. Otherwise, the sliding scale that protects judicially selected minority groups will become too slippery to

63. 348 U.S. 483 (1955).
64. 366 U.S. 420 (1961).
65. 394 U.S. 802 (1969).
66. 440 U.S. 568 (1979).
67. *Id.* at 572 n.3.
68. *Id.* at 606 (White, J., dissenting).
69. *Id.* at 610–11.
70. *Id.* at 596–97 (Powell, J., concurring in part and dissenting in part).
71. *Id.* at 593 (footnote omitted).
72. *Cf.* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (Warren Court invalidated Virginia's poll tax by invoking its "new" equal protection doctrine to secure the fundamental interest in voting).

be credible. Moreover, someday the Court will awaken to the fact that it cannot protect only those special groups which *it* perceives to be politically weak and victimized. The purpose of the Equal Protection Clause is to protect all individuals and classes. If this were not so, only the perennial losers in the political process would be entitled to meaningful equal protection of the laws. Over a century ago, the Court realized that the Equal Protection Clause means more; it "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."[73]

C. Minnesota v. Clover Leaf Creamery Co. *and the State Court's Level of Scrutiny*

Formulations of the rationality requirement, however phrased, raise but do not answer the question whether a challenged legislative classification *in fact* results in the disparate treatment of similarly situated persons. The question often narrows to an appraisal of the sufficiency of the evidence that supports the legislative facts. The distinction between the rationality requirement, a legal standard that relates to fit, and the proper method of applying the rationality requirement to disputed facts is the subject of Justice Steven's dissent in *Minnesota v. Clover Leaf Creamery Co.*[74]

In *Clover Leaf* the Court upheld a Minnesota statute[75] designed, at least in part, to preserve the environment and conserve energy. Justice Stevens, in his dissenting opinion, drew a distinction between "the appropriate equal protection standard"[76] and the empirical relationship between the legislature's classification and its purpose. In *Clover Leaf*, he would have deferred to the state court's holding that the statute *in fact* discriminated irrationally in violation of the federal Equal Protection Clause.[77] He condoned the "state judges' skeptical scrutiny"[78] of the challenged statute, and argued that the Court should defer to a state court that appraises the legislative facts without deference to the state legislature.[79]

The challenged statute prohibits the retail sale of milk in nonreturnable plastic containers. Milk sold in paperboard cartons is unaffected.[80] The Minnesota Supreme Court properly recognized that "the relevant test is whether the classification is rationally related to a legitimate state interest."[81]

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73. Missouri v. Lewis, 101 U.S. 22, 31 (1879).

74. 449 U.S. 456, 477–89 (1981).

75. MINN. STAT. § 116 F.21 (West Supp. 1981).

76. 449 U.S. 456, 483 n.7 (Stevens, J., dissenting).

77. *Id.* at 482–85.

78. *Id.* at 485 n.10.

79. "Of course, if a federal trial court had reviewed the factual basis for a state law, conflicts in the evidence would have to be resolved in favor of the State. But when a state court has conducted the review, it is not our business to disagree with the state tribunal's evaluation of the State's own lawmaking process." *Id.* at 482–84 (footnote omitted).

80. Clover Leaf Creamery Co. v. Minnesota, ____ Minn. ____, 289 N.W.2d 79, 81 (1979) (footnote omitted), *rev'd*, 449 U.S. 456 (1981).

81. *Id.*

It is clear, however, that the state court resolved conflicts in the evidence against the state and substituted its judgment for that of the legislature. Minnesota's highest court concluded, "[T]here is no significant difference between plastic containers and paper containers."[82] The Supreme Court reversed.

Justice Brennan wrote the opinion of the Court and stated:

> [I]t is not the function of courts to substitute their evaluation of legislative facts for that of the legislature.
>
> We therefore conclude that the ban on plastic nonreturnable milk containers bears a rational relation to the State's objectives, and must be sustained under the Equal Protection Clause.[83]

The Court's holding is not surprising. "[T]he Court . . . simply determined whether the state court's federal constitutional decision is 'correct,' meaning in this context, whether it is the decision that the Supreme Court would independently reach."[84] The general rule, articulated in *Oregon v. Haas*,[85] is that a state court may not impose greater restrictions on state officials "as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[86]

Oregon v. Haas, however, did not deal with a state court's restrictions on the state legislature.[87] Justice Stevens therefore found "no support for [the Court's] novel constitutional doctrine in either the language of the Federal Constitution or the prior decisions of [the] Court."[88] He objected to the Court's interference with the relationship between the state legislatures and state courts. He deemed it "extraordinary that this Federal Tribunal feels free to conduct its own *de novo* review of a state legislative record in search of a rational basis that the highest court of the State has expressly rejected."[89]

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82. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 485 n.10 (1981) (Stevens, J., dissenting).

83. *Id.* at 470 (footnote omitted).

84. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1243 (1978) (footnote omitted) [hereinafter cited as Sager]. *See also* Bice, *supra* note 1. Professor Bice also points out, quite correctly, that rationality analysis can be employed by state courts to review state legislation, and that "considerations of federalism are not commonly involved." *Id.* at 42.

85. 420 U.S. 714 (1975).

86. *Id.* at 719 (footnote omitted). Of course, as the Court pointed out, "A state court may . . . apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981).

87. The question presented was whether "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Oregon v. Haas, 420 U.S. 714, 719 (1975). In Professor Tribe's view, *Oregon v. Haas* was "wrongly decided; the Constitution did not require a determinate interpretation in that case." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 32 (1978) [hereinafter cited as TRIBE]. Professor Tribe believes that "the Constitution creates—a process which on various occasions gives the Supreme Court, Congress, the President, or the States, the last word in constitutional debate." *Id.* at 33. *But see* text accompanying notes 103–06 *infra*.

88. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 477 (1981) (Stevens, J., dissenting). Justice Stevens distinguished the following cases which the Court relied upon to rebut his thesis: Idaho Dept. of Employment v. Smith, 434 U.S. 100 (1977); County Bd. of Arlington v. Richards, 434 U.S. 5 (1977); Richardson v. Ramirez, 418 U.S. 24 (1974); Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973). He distinguished these as cases where the "Court concluded that the state court had applied an incorrect legal standard." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 482 n.7 (1981).

89. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 482 (1981) (Stevens, J., dissenting).

Justice Stevens was impressed with the evidence produced at trial "indicating that the decision of the Minnesota Legislature was factually unsound,"[90] and with the findings and methodology of the trial judge who assumed "as fact-finder [that he was] obliged to weigh and evaluate . . . evidence, much of which was in sharp conflict."[91] Justice Stevens did not deny, of course, that "questions of constitutional power frequently turn . . . on questions of fact,"[92] but he vigorously denied that the state courts are required to review challenged legislative facts as if they were "cloaked with the presumption that the legislature has acted within constitutional limitations."[93] Under the facts and circumstances of *Clover Leaf*, it would appear that the extraordinary, if not novel, views are those of Justice Stevens.

The state court's analysis of the challenged classification is reminiscent of the Lochnerizing variety of means scrutiny at its zenith. For example, the Minnesota Supreme Court, relying in part on the trial judge's findings and its "own independent review of the documentary sources,"[94] determined that the evidence of the state's expert witness was based on a "weak and inconclusive foundation."[95] In the court's opinion, the expert's testimony "lacked convincing quality."[96] Based on its appraisal of other controverted legislative facts, the court found that "paper containers are not environmentally superior to plastic refillables."[97] Although the Minnesota Supreme Court did not question the legitimacy and importance of the legislature's purposes, it held that "the Act, at best will not be a step toward amelioration of a perceived evil."[98] In short, the state court was acting as a super-legislature.

If state trial courts have power to review the factual basis for the state's legislation without deference, this practice "makes it necessary for a judge to hear all the evidence offered as to why a legislature passed a law and to make findings of fact as to the validity of those reasons."[99] An appraisal of disputed legislative facts by a state court requires a "balancing of probabilities [that] is not . . . a matter for judicial determination, but one which calls for legislative consideration."[100] Each state, of course, is ordinarily free to prescribe "[t]he functions that a state court shall perform within the structure of state government,"[101] but it pushes the rationality requirement toward a *reductio ad*

90. *Id.* at 485 n.10.
91. *Id.* at 481 n.6.
92. Oregon v. Mitchell, 400 U.S. 112, 229 (1970) (Brennan, J., dissenting in part and concurring in part).
93. *Id.* at 247.
94. Clover Leaf Creamery Co. v. Minnesota, ____ Minn. ____, 289 N.W.2d 79, 82 (1979), *rev'd*, 449 U.S. 456 (1981).
95. *Id.* at 83 (footnote omitted).
96. *Id.*
97. *Id.* at 86.
98. *Id.*
99. Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 794 (1945) (Black, J., dissenting) (Court invalidated state law pursuant to negative implications of Commerce Clause).
100. *Id.*
101. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 481 (1981) (Stevens, J., dissenting).

absurdum if the Supreme Court is required to adopt state court reassessments of the factual predicate for legislative action.

To be sure, the policy arguments in favor of greater state court enforcement of underenforced norms and indeterminate norms have appeal.[102] But, it is often forgotten by some proponents of stricter rationality analysis that the Equal Protection Clause, as written and as originally understood and applied, does not demand instrumental rationality. As Justice Linde writes:

> [I]f the Constitution does not command legislatures in the act of legislating to go through the kind of analysis that the proponents of rationality review demand of courts "after the fact," then the legislature has not acted unconstitutionally when its product is challenged for violating the Constitution.[103]

I do not go as far as Justice Linde; conceptions of equal protection *do change*.[104] But, the issue presented by Justice Stevens' dissent in *Clover Leaf* is whether the Supreme Court of the United States must acquiesce when the state courts change or ignore constitutional doctrine by eliminating the federal courts' presumption of constitutionality.

It is argued by Professor Sager that the Equal Protection Clause is an "underenforced norm," and that state courts, properly uninhibited by the concerns of federalism and other institutional constraints on the federal courts, should have more leeway to enforce the equality principle.[105] The Equal Protection Clause, however, would *not* be an underenforced norm if the federal courts meaningfully applied the rationality requirement. This is not the case currently. Nevertheless, the failure of the federal courts creates no power vacuum for the state courts to fill. As Justice Linde reminds us, the rationality is a gloss added by the Supreme Court that was not demanded by the framers of the fourteenth amendment.[106]

The ultimate issue is whether the challenged legislation requires correction owing to the legislature's normative and empirical errors. Because the perspective and values of the state courts are likely to vary, the Supreme Court's judgment ought to control. In sum, the balance between the benefits of stricter state court enforcement of underenforced constitutional norms and the advantages of nationwide uniformity ought to be struck in the final analysis by the Supreme Court without extraordinary deference to the state courts.

This too must be said: A state court that acts pursuant to its duty to interpret the self-executing aspects of the fourteenth amendment is acting as a

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102. *See generally* TRIBE, *supra* note 87, at 27–33; Sager, *supra* note 84.

103. Personal letter from Justice Linde to Gary Leedes (March 16, 1981). *See also* Linde, *supra* note 2. *Cf.* Oregon v. Mitchell, 400 U.S. 112, 127 (1970) ("The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection.") (Black, J., announcing opinion of Court and expressing his own view on constitutionality of 1970 Voting Rights Act amendments).

104. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

105. *See* Sager, *supra* note 84.

106. *See* Linde, *supra* note 2; Personal letter from Justice Linde to Gary Leedes (March 16, 1981).

constitutional court. It therefore must utilize a methodology consistent with the Supreme Court's presumption of constitutionality for the challenged classification. This presumption entails deference to the legislature that enacted the challenged classification, but the presumption does not mean that the facts which provide the rational basis for the classification are true. The presumption is that the legislature has not abused its discretion when it has reasoned from the evidence to find legislative facts.[107] The court should focus on the legislative and trial record in order to determine whether the legislature arrived at its conclusion by a process of *reasoning* from the evidence. The Court's rationality requirement simply prevents judges from becoming mindless robots who rubberstamp mindless discriminatory legislation. But, whatever bite the Supreme Court's rationality requirement does or does not have at a given time, it is binding on the states. It follows that the Court's presumption of constitutionality, which in part pertains to the empirical component of the Court's rationality requirement, has Supremacy Clause[108] ramifications, a constitutional dimension that may not legitimately be ignored by state courts. The state courts are agents without power to pursue frolics of their own unless ratified by the Supreme Court's independent judgment.[109]

The rationality requirement, as applied by the Supreme Court, is becoming less perfunctory. As Professor Gunther has described this movement, "Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced."[110] Although the Court in *Clover Leaf* quite properly upheld the challenged classification, Justice Brennan's opinion indicates that he applied a meaningful rationality requirement, neither too strict nor totally toothless. He wrote:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."
>
> Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as "it is evident from all the considerations presented to [the

107. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). This statement of Chief Justice Hughes in a case involving judicial review of agency action "would appear to have been derived from the test for sustaining a jury verdict." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 596 (1965).

108. U.S. CONST. art. VI.

109. *Cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958). In this school desegregation case, the Court articulated a broad definition of its power: "[T]he federal judiciary is supreme in the exposition of the law of the Constitution." *Id.* The Court added, "Every state legislator and executive and judicial officer is solemnly committed by oath . . . 'to support this Constitution.'" *Id.*

110. Gunther, *supra* note 49, at 20.

> legislature], and those of which we may take judicial notice, that the question is at least debatable." Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.[111]

This deferential judicial attitude prevents legislatures from being turned into mere conduits for the transmission of cases to the courts.[112] On the other hand, Justice Brennan could be sending this signal: If the legislative record indicates that there is no substantial evidence[113] supporting the legislative determination, the Court may intervene and invalidate the legislation in accordance with the rationality requirement.

D. United States Railroad Retirement Board v. Fritz: *An Apparently Thoughtless Classification Survives*

The debate among the Justices about the meaning of the rationality requirement has been enlivened by the various opinions filed in *United States Railroad Retirement Board v. Fritz*.[114] The Railroad Retirement Act of 1974[115] fundamentally restructured the railroad retirement system in place under the predecessor 1937 Act.[116] Under the new Act, as under the 1937 Act, some employees are entitled to both social security and railroad retirement benefits. Other employees under the new Act are not entitled to all the dual benefits guaranteed under the old Act. For example, an unretired individual, as of January 1, 1975, the changeover date, who had eleven years of railroad employment is eligible for the dual benefit if he (1) qualified for social security benefits, (2) worked for the railroad during 1974, or (3) had a "current connection" with the railroad as of December 31, 1974, or his later retirement date.[117] This class of unretired employees loses no vested benefits. On the other hand, an unretired individual, as of January 1, 1975, who had twenty-four years of railroad employment is ineligible for the dual benefits, even though qualified for social security benefits, if he (1) had not worked for the railroad at least one day

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111. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (citations omitted). Justice Brennan admonished the state court to adhere to the federal test for evaluating the sufficiency of the evidence supporting legislative facts.

> Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.

Id. at 466. Justice Brennan made it clear that the Court's test applies whether the challengers assail "the *theoretical* connection between a ban on plastic nonreturnables and the purposes articulated by the legislature . . . [or the] *empirical* connection between the two." *Id.* at 463.

112. *Accord*, ATTORNEY GENERAL, REPORT OF COMMITTEE ON ADMINISTRATIVE PROCEDURE 91 (1941).

113. Formulas governing scope of review of legislative action are like rubber, not wood, and therefore expand and contract like most other judicial doctrines. Federal courts today are taking a harder look at some special cases of interest to them, but the delicacy of the undertaking requires the Supreme Court to keep a tight rein not only on the federal district judges, but on state court judges as well.

114. 449 U.S. 166 (1980).

115. 45 U.S.C. §§ 231–231t (1976).

116. Ch. 382, 75 Stat. 307 (1937).

117. 449 U.S. 166, 171–72 (1980).

during 1974, and (2) had no "current connection" with the railroad as of December 31, 1974, or his later retirement date.[118] He loses some vested retirement benefits. Summarizing the distinctions described above, Congress comparatively disadvantaged a class of employees on the basis of their lack of connection with the railroad as of 1974 or their later retirement date.[119]

The rationality requirement poses this question: Were dissimilarly treated classes of employees similarly situated with reference to the purposes of the Act? In addition to the primary goal of placing the railroads on a "sound financial basis,"[120] the purpose of the challenged distinction was to establish "equitable retirement benefits for all railroad employees."[121] How did the classification relate to that purpose? The Court argued, without evidentiary support in the legislative record, that Congress "could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim"[122] and that persons who were not pursuing careers in the railroad, as of 1974, were not members of "the class for whom the Railroad Retirement Act was designed."[123] The Court, citing *Flemming v. Nestor*,[124] maintained that it is, "of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.'"[125] Justice Rehnquist also added a footnote reiterating the Court's new rationale for the old deference: "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic processes and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[126]

In his dissenting opinion, Justice Brennan argued that "equal protection analysis has evolved substantially . . . since *Flemming* was decided."[127] In his view, the Court's current approach requires the government to justify the rationality of the challenged classification, but when skeptical, the Court will dig into the legislative history in order to discover "the actual purposes of Congress."[128] Moreover, Brennan argued, the Court should not adopt a tautological approach in its purpose inquiry in order to avoid "the necessity for evaluating the relationship between the challenged classification and the legislative purpose."[129] Thus, the "Court will no longer sustain a challenged clas-

118. *Id.*
119. *Id.* at 196–97 n.11 (Brennan, J., dissenting).
120. *Id.* at 169.
121. *Id.* at 169 n.2.
122. *Id.* at 170.
123. *Id.*
124. 363 U.S. 603 (1960).
125. 449 U.S. 166, 179 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).
126. *Id.* at 179 n.12 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).
127. 449 U.S. 166, 187 (1980) (Brennan, J., dissenting).
128. *Id.*
129. *Id.* at 186.

sification under the rational basis test merely because government attorneys can suggest a 'conceivable basis' upon which it might be thought rational."[130] Brennan often goes beyond the Gunther model, which was designed in part to reduce judicial maneuverability and which does "not call for a delving into actual legislative motivation."[131] As a consequence, Justice Brennan concluded that the classification was not "rationally related to achievement of an *actual* legitimate governmental purpose."[132]

Justice Rehnquist replied that the Court's test, however the phraseology may vary from case to case, is designed to prevent courts from imposing on the government their views of what constitutes wise economic or social policy, and that the problems of government justify rough, even illogical, accommodations.[133] This stand-pat approach provoked Justice Stevens to file a concurring opinion in which he wrote: "When Congress deprives a small [group of their protected vested rights in order to benefit others] . . . who are in a similar though not identical position, I believe the Constitution requires something more than merely a 'conceivable' or a 'plausible' explanation for the unequal treatment."[134] The problem, Justice Stevens continued, is that the actual purpose of the legislature is sometimes unknown.[135] Moreover, legislation is often the "product of multiple and somewhat inconsistent purposes that led to certain compromises."[136] Justice Stevens, in *Fritz*, was satisfied that the method employed by Congress was reasoned and impartial, and that the line, drawn on the basis of an employee's contacts with the railroad during the year prior to the changeover date, was reasonable.[137]

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130. *Id.* at 188.

131. Gunther, *supra* note 49, at 46.

132. 449 U.S. 166, 188 (1980) (Brennan, J., dissenting).

133. *Id.* at 174–76 (majority opinion). This debate between Justice Brennan and Justice Rehnquist, which was joined by Justice Powell in Schweiker v. Wilson, 101 S. Ct. 1074, 1087–88 (1981) (Powell, J., dissenting), *see* text accompanying notes 146, 166–71 *infra*, has spilled over into areas of constitutional law outside the Equal Protection Clause. In Kassel v. Consolidated Freightways Corp., 101 S. Ct. 1309 (1981), Justice Brennan and Justice Rehnquist continued their verbal joust in the context of asserted justifications for state law that arguably burdens interstate commerce. In a footnote to his concurring opinion, Justice Brennan set forth his view:

> The extent to which we may rely upon *post hoc* justifications of counsel depends on the circumstances surrounding passage of the legislation. Where there is no evidence bearing on the actual purpose for a legislative classification, our analysis necessarily focuses on the suggestions of counsel. Even then, "marginally more demanding scrutiny" is appropriate to "test the plausibility of the tendered purpose." Schweiker v. Wilson, 101 S. Ct. 1074, 1088 (1981) (Powell, J., dissenting). But where the lawmakers' purposes in enacting a statute are explicitly set forth, or are clearly discernible from the legislative history, this Court should not take—and with the possible exception of United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 183–84 (1980) (Brennan, J., dissenting), has not taken—the extraordinary step of disregarding the actual purpose in favor of some "imaginary basis or purpose." The principle of separation of powers requires, after all, that we defer to the elected lawmakers' judgment as to the appropriate means to accomplish an end, not that we defer to the arguments of lawyers.

Id. at 1322 n.3 (Brennan, J., concurring) (some citations omitted). In his dissent, Justice Rehnquist posited that "it is not clear the analysis of legislative purpose in [the equal protection] area is the same as in the [Commerce Clause] context," *id.* at 1333 n.13, but nevertheless devoted considerable energy to a rebuttal of Justice Brennan's analysis. *Id.* at 1332–33.

134. 449 U.S. 166, 180 (1980) (Stevens, J., concurring).

135. *Id.* at 181.

136. *Id.*

137. *Id.* at 182.

Several Justices appear to be moving away from an approach vividly described by Professor Fiss in the following manner:

> The court fixes the state's purpose by the process of imagination: only legitimate purposes would be imagined, and the judge's mind would scan the universe of legitimate purposes until he identified the legitimate state purpose that was best served by the criterion, the one that left the smallest margins of over- and under-inclusiveness.[138]

The Court is citing *McGowan*[139] and *McDonald*[140] less frequently.[141] Instead of inquiring whether the classification is "totally unrelated," there is in the Court's recent phraseology, notwithstanding Justice Rehnquist's views,[142] an increasingly strong indication that a classification is arbitrary if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legislative purposes that we can only conclude that the legislature's actions were irrational."[143] The most arrogant legal scholar would not claim that this is a radical shift. However, the debate in *Fritz* indicates that several Justices are reconsidering what for decades has been a fiction: the desirability of a rationality requirement that demands reasoned explanations justifying challenged classifications.

E. Schweiker v. Wilson: *Justice Powell's Refinement of the Gunther Model*

The most intriguing of all the equal protection cases decided during the 1980 Term is *Schweiker v. Wilson*.[144] The dicta of the majority opinion are fecund with possibilities that will benefit litigants who rely on the rationality requirement.[145] Moreover, the dissenting opinion of Justice Powell reveals that at least four Justices will intensify the Court's level of scrutiny if the legislature does not clearly identify the actual purposes that justify the challenged statutory classification.[146]

The Supplemental Security Income program[147] considered in *Wilson* is a comprehensive federal program of minimal cash welfare benefits for the indigent, blind, and disabled.[148] A small comfort allowance of twenty-five dollars per month is provided to otherwise eligible persons who reside in public institutions, but "only if the qualified person resides in a public hospital or institution that receives Medicaid funds on his behalf."[149] No

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138. Fiss, *supra* note 17, at 112.
139. 366 U.S. 420 (1961).
140. 394 U.S. 802 (1969).
141. Justice Rehnquist, for a change, did not cite *McDonald* or *McGowan* in his *Fritz* opinion, but he still seems wedded to that toothless approach. *But see* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Cruz v. Beto, 405 U.S. 319, 326 (1972).
142. 449 U.S. 166, 176 n.10 (1980).
143. Vance v. Bradley, 440 U.S. 93, 97 (1979).
144. 101 S. Ct. 1074 (1981).
145. *See* text accompanying notes 153–65 *infra*.
146. *See* text accompanying notes 164–66 *infra*.
147. 42 U.S.C. §§ 1381–1397f (1976).
148. S. REP. NO. 92–1230, at 4 (1972). *See* Schweiker v. Wilson, 101 S. Ct. 1074, 1077 (1981).
149. 101 S. Ct. 1074, 1086 (1981) (Powell, J., dissenting).

comfort allowance "will be paid to an individual unless the form of institutionalized treatment he receives is compensable under the separate Medicaid program."[150] Thus, "Congress made a distinction . . . between residents in public institutions receiving Medicaid funds for their care, and residents in . . . institutions not receiving Medicaid funds."[151] Plaintiff-appellees in *Wilson* were persons residing in public institutions who were ineligible for the supplemental benefits.[152]

The Court concluded that Congress did not violate the plaintiffs' rights to equal protection by denying them the supplementary benefit.[153] Justice Blackmun explained that

> the decision to limit distribution of the monthly stipend to inmates of public institutions who are receiving Medicaid funds "is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units" and "may be said to implement a congressional policy choice to provide supplemental financial assistance for only those residents of public institutions who already receive significant federal support in the form of Medicaid coverage."[154]

He also noted that "it was [not] irrational of Congress, in view of budgetary constraints, to decide that it is the Medicaid recipients in public institutions that are the most needy and the most deserving of the small monthly supplement."[155]

Significantly, the Court noted that the decision of Congress to exclude those who received no Medicaid funds had been *intentional* and not inadvertent.[156] In the Court's view, the exclusion "advances [an] *identifiable* governmental objective."[157] Although the legislative history showed the challenged exclusion was a deliberate choice by Congress,[158] the Court relied primarily on the brief of the government, which identified the governmental objective.[159] This reliance on positions advanced by government attorneys is consistent with the model of equal protection described by Professor Gunther,[160] and the Court insisted that its minimal level of judicial scrutiny is "not a toothless one."[161] Although Justice Powell argued in dissent that the Court was too deferential towards the Congress and should not have accepted at face value the government attorneys' articulation of the congressional purpose,[162] the Court's distinction between a deliberate choice by Congress

150. *Id.*
151. *Id.* at 1082 (majority opinion).
152. *Id.* at 1078.
153. *Id.* at 1085.
154. *Id.* at 1084.
155. *Id.* at 1085.
156. *Id.* at 1084.
157. *Id.* at 1083.
158. *Id.*
159. *Id.* at 1084.
160. *See generally* Gunther, *supra* note 49.
161. 101 S. Ct. 1074, 1082 (1981) (quoting, Matthews v. Lucas, 427 U.S. 495, 510 (1976)).
162. *Id.* at 1085 (Powell, J., dissenting).

and one that is "the result of inadvertence or ignorance"[163] is crucial. This distinction will almost surely spawn a new line of cases. The Court seems to be signalling that it will no longer tolerate thoughtless classifications, and that the government will have the burden not only to identify its objectives,[164] but to demonstrate that the objective articulated by the government attorneys is consistent with a deliberate choice made by the legislature.[165] This approach should help courts reduce the risk of arbitrary classifications.

Although the Justices "continue to hold divergent views on the clarity with which a legislative purpose must appear,"[166] the requirement of an identifiable legislative purpose is now more firmly established in the Court's cases if *Wilson* is our guide. Justice Powell goes further than the majority. In his view, "When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence."[167] In order to promote candor on the part of government attorneys and to avoid rubberstamping legislation that fits some "fictional" *post hoc* purpose articulated by counsel, Justice Powell would "require that the classification bear a 'fair and substantial relation' to the asserted purpose . . . [to] preserve equal protection review as something more than 'a mere tautological recognition of the fact that Congress did what it intended to do.'"[168] In typically understated fashion, Justice Powell utilized a footnote to discredit *Flemming*[169] and *McGowan*[170] as cases which "do not describe the importance of actual legislative purpose in our analysis" of Equal Protection Clause challenges to statutory classifications.[171]

The recent cases show the Court is still uncertain and adrift so far as the rationality requirement is concerned because the Justices cannot reach a consensus on how to formulate and apply the rational basis test.[172] Justice Rehnquist still favors the *Flemming* approach, which amounts to excessive deference.[173] Justice Brennan still engages in intrusive and not always dispassionate ends analysis, which is reminiscent of selective Lochnerizing on behalf of certain powerless groups.[174] Since a new Justice has been appointed to the Supreme Court, the future cannot be predicted by this

163. *Id.* at 1084 (majority opinion).

164. The majority opinion, written by Justice Blackmun, like Justice Powell's dissent, insisted that "the classificatory scheme chosen by Congress [must be one] that rationally advances a reasonable and *identifiable* governmental objective . . . ." *Id.* at 1083 (emphasis added).

165. "[T]he decision to incorporate the Medicaid eligibility standards into the Supplemental Security Income scheme must be considered Congress' deliberate, considered choice." *Id.*

166. *Id.* at 1087 n.4 (1981) (Powell, J., dissenting).

167. *Id.* at 1088.

168. *Id.*

169. 363 U.S. 603 (1960).

170. 366 U.S. 420 (1961).

171. 101 S. Ct. 1074, 1088 n.6 (1981) (Powell, J., dissenting).

172. *Id.* at 1087 n.4.

173. *See* text accompanying notes 120–26 *supra*.

174. *See* text accompanying notes 127–32 *supra*.

commentator. Yet, Justice Powell's dissent in *Wilson* could provide the basis for a consensus in the near future.

Justice Powell's approach[175] is a refinement of the Gunther model. It places the burden on the government to articulate its purposes so that the issues are narrowed and the challenger's burden of proof is realistic and surmountable. Justice Powell applies a fair and substantial relationship test when the legislature does not articulate its purposes, lessening the likelihood that the government will prevail simply because its attorney attributes to a classification the permissible purpose that best explains it,[176] a purpose that could be tautological or based on considerations that the legislature obviously did not consider. The problem with Justice Powell's approach is his insistence on applying the rationality requirement in situations where it should be inapplicable. For example, if the Congress favored some Medicaid recipients over otherwise identically situated disabled indigents simply because it believed one group of Medicaid recipients more deserving than another, the legislature's sense of fitness is not necessarily amenable to the rationality requirement. There are some distinctions reflecting the legislature's biases and preferences that ought to be upheld by the Court.

II. Towards a Realistic Ends Scrutiny in Equal Protection Cases

Several problems associated with the rationality requirement are of grave concern to a Court that, by and large, is properly uninterested in imposing upon government its views as to what constitutes wise economic or social policy. Perhaps the greatest problem is "to avoid a disguised examination of legislative ends"[177] inevitably leading to an evaluation of the importance of the government's ends. In the years since Gunther has published his article calling for "new bite for the old equal protection,"[178] many thoughtful commentators have pointed out just how formidable the Court's "ends inquiry" problems are.[179] In this section I will discuss some of those difficulties.

The government rarely identifies its ends with adequate specificity. Moreover, the legislature does not always fully appreciate which ends its classifications serve beyond some vague conception that it is necessary to draw a line. Drawing a line is an administrative convenience; the consequences of drawing it at one place rather than another are not always carefully considered. The point of least resistance from the electorate may be the determinant—that is, the legislature yields to the pressures applied by various groups interested in the line drawing. In less polite terms, the legislature shows favoritism toward the benefitted class and indifference or antipathy toward

175. *See* text accompanying notes 167–71 *supra*.
176. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 127 n.* (1980).
177. Gunther, *supra* note 49, at 48.
178. *Id.* at 20.
179. *See, e.g.*, Linde, *supra* note 2.

the disadvantaged class. No legislature can be consistently impartial, and representatives are not elected to be impartial.[180]

Although it imposes limits on the legislature's discretion to draw lines, the rationality requirement does not ordinarily limit the legislature's power to govern. So long as a statute does not impermissibly invade an area of governance beyond the legislature's power,[181] the representatives have wide discretion to draw lines where they please. It is a common misconception that the Equal Protection Clause prohibits the legislature from being partial. For example, Justice Stevens, concurring in *Fritz*, warned that "[i]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."[182] Justice Stevens implies that if the Court's suspicions of bias were confirmed, the classification would violate the Equal Protection Clause.[183] This position is unrealistic and Professor Posner explains why.[184]

Professor Posner has observed that although the Court's "expressed view . . . is that the political process is one of honestly attempting to promote efficiency, or justice, or some other equally general conception of the public good,"[185] the expressed view is a fig leaf concealing a "pure power struggle . . . among narrow interests and/or pressure groups."[186] Posner also observed that many interests and groups obtain favorable legislation owing to their "money, votes, cohesiveness, [and] ability to make credible threats of violence or other disorder."[187] In short, most statutes are not consciously enacted in the public interest and it is unrealistic for the Court to insist they are.[188] Posner's argument strikes the intellect. Most legislation is the product

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180. Learned Hand wrote:

> In theory, any statute is always open to challenge on the ground that it was not in truth the result of an impartial effort, but from the outset it was seen that any such inquiry was almost always practically impossible, and moreover, it would be to the last degree political.

L. HAND, THE BILL OF RIGHTS 67 (1958).

181. The legislature's power quite obviously is limited, for example, by U.S. CONST. art. I, § 9, cl. 3 (no bill of attainder), art. I, § 9, cl. 8 (no title of nobility shall be granted), art. I, § 8, cl. 3 (negative implications of the Commerce Clause), art. IV, § 2 (privileges clause), the Bill of Rights, and substantive due process principles.

182. United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring).

183. *Id.* at 181–82. *See also* Craig v. Boren, 429 U.S. 190, 211–14 (1976) (Stevens, J., concurring).

184. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.

185. *Id.* at 27.

186. *Id.*

187. *Id.*

188. *Id.* at 27–31. A recent article in Harper's magazine, which analyzed the problem of budget cutting, corroborates the point. Tom Bethell wrote:

> As David Stockman pointed out . . . legislators can win votes and friends by taking away a penny from everyone and handing out a dollar to a select few. Stockman called this the "social pork barrel." The few will be duly grateful and will remember their representatives on election day. The rest won't miss the penny. To realize how inexorably ratchet-like this process becomes, imagine trying to reverse it, taking back the dollar and resorting the pennies. Multiply this mechanism across the hundreds of special-interest groups that have built up over fifty years—all trying to qualify for their own share of handouts—and you can appreciate the momentum of federal spending.

HARPER'S, May, 1981, at 23. The rationality requirement is often ill-suited as a judicial technique calculated to reverse this "ratchet-like process." Ronald Dworkin writes:

> It is unrealistic to think that individual legislators decide how to vote by measuring the programmes submitted to them against Benthamite conceptions of the general good, deciding on nice calculations

of a politically successful coalition that seeks to advance its own material and ideological interests. Can this be an end prohibited by the Equal Protection Clause? The courts, to the extent they tackle the subject, indicate that this kind of favoritism is indeed prohibited. Bennett reads the precedent correctly when he declares that "unalloyed personal favor is beyond the present legislative pale."[189] John Hart Ely also argues that the government may not bestow favors simply because it likes or dislikes persons or classes.[190] These aspirations are consistent with the Supreme Court's interpretation of the Constitution. For example, Chief Justice Taft declared in *Truax v. Corrigan*[191] that the equal protection "guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other."[192]

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how far to pursue one strategy, and when to leave it off in favour of another. The institution of representative democracy is an imperfect machine for pursuing the general welfare; it works to the degree it does, as a kind of black box, in which various sorts of political pressures compete, so that (if the community is lucky) an invisible hand will produce an approximation of the general good over the long run. . . .

R. DWORKIN, TAKING RIGHTS SERIOUSLY 323–24 (1978).

189. Bennett, *supra* note 43, at 1083.

190. J. ELY, DEMOCRACY AND DISTRUST 137 (1980). I would agree that favoritism and antipathy deny equal protection of the laws if law enforcement officers and administrators single out individuals on the basis of their likes or dislikes, but this manifestation of bias is not intended by the legislature. Thus, such discrimination is literally a denial of equal protection of the laws. On the other hand, even Professor Ely cannot deny the "concentrations of power, and inequalities among the various competing [interest] groups in American politics." *Id.* at 135. My point, contrary to Ely's thesis, is that favoritism towards the more powerful groups by elected representatives is not necessarily an indication that the political process is malfunctioning. As Justice Powell has written, "Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law." Fullilove v. Klutznik, 448 U.S. 448, 502 (1980) (Powell, J., concurring). Too many judges and commentators confuse legal bias, which disqualifies judges and some officials of administrative agencies, *see* Marshall v. Jerrico, Inc., 448 U.S. 238, 247 (1980) (biasing influence does not disqualify a decisionmaker who performs no judicial or quasi-judicial functions), with the legitimate biases of elected representatives in the legislatures who aim to please their constituents, whether their constituents be those favored by the Black Caucus, as was the case with the "minority business enterprise provision" in § 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), *see* Fullilove v. Klutznik, 448 U.S. 448 (1980) (Stevens, J., dissenting), or the "rich" oil companies. At times, a Supreme Court Justice will recognize this fact of life. For example, Justice Blackmun in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), wrote: "It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in the veterans' preferences. We see it in the aid to the handicapped programs. We see it in the progressive income tax. We see it in the Indian programs." Justice Blackmun approved of these preferences.

What is unrepublican about a legislature that favors an economic or cultural special interest group? It is often inappropriate for courts to require legislatures to ignore groups who successfully exert extra effort to influence legislation. This effort may take various forms: speeches, protests, votes, formation of coalitions, and campaign contributions. This is what the political process is all about. It would seem that when the legislature favors one faction over another because of the influence they have brought to bear, the question presented to a court is usually political and not a constitutional question. Officials, after all, are often elected because the electorate likes them and dislikes their opponents. It is only natural—not unconstitutional—that the elected officials will reciprocate and like or favor some of their constituents over and above others.

191. 257 U.S. 312 (1921).

192. *Id.* at 332–33. Justice Taft's statement is unrealistically overbroad. Statements of this *genre* overlook the fact that legislators, like judges, have their own "can't helps." Thus, a legislature may favor the dam builder over the snail darter, the conglomerate over the environmentalist, and this group over that group. One legislature may favor the fetus over the physical or mental health of the pregnant female. Another legislature, at a different time and place, may favor the pregnant female. But the legislators' preference of one being over the other in this and in many other zero sum games may depend on conventional morality—values, not legislative or adjudicative facts, are often dispositive. The dispositive value choice reflects the representative's choice of

Because the Court indicates that both antipathy and pure favoritism are ends always prohibited by the Equal Protection Clause, legislatures conceal their true aims with respectable figleaves, government attorneys often lack candor, and courts often can scan the universe for some hypothetical impartial end the legislature may never have considered. This scanning technique appears to eliminate the ends inquiry difficulty, but a court obviously deceives itself and the public when it holds that the health, safety, and general welfare are intended to be furthered by a statute that was actually enacted for reasons unrelated to these ends. The mirage is necessary only because the Court's list of permissible ends does not include favoritism or antipathy. It is my contention that the Court's notions of impermissible ends are too strict, counterproductive, and unnecessary.

When the legislature decides to benefit one group over another, it frequently regards the traits of the benefitted group as equal to—or better than—the group that is comparatively disadvantaged. In our pluralistic society (known for a substantial amount of ethical relativism), the correctness of moral judgment is not deemed to be a matter of knowledge or truth. Rather, it is acknowledged that moral judgment often reflects tastes, feelings, conditioning, social conventions, or some other noncognitive basis for decision. Reasons of course should be given, whenever feasible, by those defending challenged legislative classification. But the ultimate reason underlying a challenged classification is frequently a moral judgment based on sentiment, passion, or some other predisposition of will. Until the Supreme Court identifies a universal moral principle under which intermediate principles of the Equal Protection Clause can be plausibly subsumed,[193] one that negatives the power of the legislatures to make moral judgments about groups, the Court's strictures against favoritism and antipathy are unrealistic demands of dubious validity. A human being does not by election to the legislature lose his or her affective nature.

There is, of course, an obvious exception to any rule of constitutional law that condones legislative hostility. The Equal Protection Clause was and is intended to eliminate hostile and stigmatizing racial discrimination. The

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priorities or his sense of appropriateness. However objectionable the choice of priorities is to a minority faction, the Constitution, in my view, does not prohibit this kind of "visceral" favoritism. Nor does it prohibit the partiality, perhaps hostility, of budget cutters, for example, who want, in their words, to "end handouts to those blankety-blank loafers on the dole." At bottom, the legislator's likes and dislikes reflect conditions of their minds, their moral principles, their tastes and, if you will, their druthers. This type of legislature preference is not amenable to a judicially imposed rationality requirement because the preference is obviously arbitrary, but since representatives, like the rest of us, are not entirely rational when it comes to basic urges, it is a lesser evil to trust the basic urges of the representative who has to stand for re-election than trust the judge who infrequently, if ever, runs for office.

Man is not entirely rational, and neither are legislators who sometimes enact into law their more primitive, unconscious urges, which cannot always be evaluated by the rationality requirement. It does not follow that such legislation is unconstitutional.

193. *See generally* A. GEWIRTH, REASON AND MORALITY (1978); *see also* N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 3–7, 288–92 (1978).

guaranty was primarily designed to protect freed slaves from the oppression of inequality. In the *Slaughter-House Cases*,[194] Justice Miller simply reiterated the common view of the day when he said, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes . . . will ever be held to come within the purview of this provision."[195] The Court has properly enlarged the ambit of the Equal Protection Clause, and it is today's common view that the Clause protects each person (and corporation) within the jurisdiction of the United States.

Although the Court should protect all individuals and groups from classifications that violate the rationality requirement, it should not be preoccupied with either unalloyed favoritism or antipathy.[196] The legislature may choose to be hostile towards burglars, pornographers, polluters of the environment, and people who let their barking dogs out in the midnight air. The legislature is empowered to enact into law the electorate's likes and dislikes. So far as the Equal Protection Clause is concerned, the legislature may be hostile towards anyone who violates the conventions of the day. It therefore may be hostile towards gamblers, unions, oil companies, hippie communes were it not for the first amendment, and even towards opticians,[197] funeral directors who sell insurance,[198] and females desiring abortions,[199] particularly when hostility is the inevitable sequel of favoritism towards opthalmologists, insurance lobbies, and those who desire to have children instead of abortions. Why? Because, as noted, the primary evil to be eradicated by the Equal Protection Clause was racism and, more to the point of this Article, because the legislature's antagonism may have a basis in the conventions of the day.

The Court's knee-jerk reaction to hostility, which it labels an impermissible end, is counterproductive because as a result, all classes and persons, except the few the Court chooses to protect specially, have virtually no protection from overinclusive and underinclusive laws. If the rationality requirement were applied across the board with relatively vigorous means scrutiny, there would be a greater likelihood that all classes and persons, including Mr. Fritz,[200] could be protected by the courts from thoughtless classifications. Currently, however, there is no meaningful protection owing to the Supreme Court's idealistic notions of impermissible ends. Too many

194. 83 U.S. (16 Wall.) 36 (1873).

195. *Id.* at 81.

196. Justice Stevens has expressed his agreement with Professor Cox's recent observation that "in the final analysis, 'the Court is always deciding whether in its judgment the harm done to the disadvantaged class by the legislative classification is disproportionate to the public purposes the measure is likely to achieve.' " Cox Book Review, 94 HARV. L. REV. 700, 706 (1981), *quoted in* Michael M. v. Superior Court of Sonoma County, 101 S. Ct. 1200, 1218 n.4 (1981) (Stevens, J., dissenting).

197. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

198. Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949).

199. *Cf.* Harris v. McRae, 448 U.S. 297, 325 (1980) (Government action "encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life.").

200. *See* text accompanying notes 114–43 *supra*.

statutes that are enacted in the mode that Posner describes would be invalidated if the Court's ideals were strictly enforced.[201] This prospect tempts the Court to weaken the rationality requirement by implausibly discerning ends that are neither overinclusive nor underinclusive.

A revenue raising statute that taxes cigarettes and not milk may further health-related concerns, but a healthy society is hardly the sole objective furthered by the differential treatment. Otherwise, tobacco farmers would not get subsidies.[202] Politics, not instrumental rationality, explains these tradeoffs. The Court almost always evades addressing the *realpolitik* observations of Posner. But the Court is hoist by its own petard. Were it not for its disdain for favoritism and antipathy, the issue would be whether the state's articulated justification for the law is arbitrary. As matters now stand, equal protection for those groups not specially protected by the Court is the dreaded "last resort of constitutional arguments."[203] The irony is exquisite: because the Court asks of the Equal Protection Clause more than it can bear, it has become barren.

Suppose the Court realizes the self-defeating nature of its ends-oriented, minimum rationality approach, and holds that hostility and favoritism are not *per se* impermissible ends. More specifically, suppose the Court upholds a law that it suspects favors the insurance lobby.[204] What would happen if the Court is candid? Funeral directors would still be prevented from selling insurance and, if the people demand reform, it will come from the political process. I believe this outcome is healthier in a democratic republic than a pretext of impartiality that distorts the political process and conceals from the voters information that is relevant at election time. If, as the Court explains, minimum rationality has no bite because those who have political power can reform the system,[205] the Court should not conceal how the political system works.

Government attorneys and legislators who fear reprisals from the electorate will, no doubt, frequently continue to disguise their true aims, but the Court will no longer be a party to the conspiracy. The Court, by refusing to acknowledge that many laws are the product of favoritism and antipathy, has become an apologist for those who, owing to their money, votes, cohesiveness, and ability to make threats credible, obtain favorable legislation.

Posner's *realpolitik* argument can be turned around. In fact, Justice Linde turned it around when he argued that the futility of discerning the real

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201. *See* text accompanying notes 184–88 *supra*.

202. Commodity Credit Corporation loans to the tobacco program from 1953 to 1981 have cost the federal government nearly $600 million dollars. Richmond Times-Dispatch, Mar. 11, 1981, § C, at 10, col. 1.

203. Buck v. Bell, 274 U.S. 200, 202 (1927).

204. *See* Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949).

205. United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 n.12 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979).

ends of a legislature[206] makes the rationality requirement "illusory."[207] It is necessary to discuss Linde's views in more detail because he has launched a most penetrating attack on the rationality of the rationality requirement.

Linde states accurately that the rationality requirement takes an "instrumentalist view of the law."[208] He thinks that it is a mistake for courts to apply the formula "that legislative means must substantially further legislative ends."[209] All laws serve some purpose,[210] he argues, but it is impossible for a judge to determine which purposes are intended to be furthered.[211] He explains that "a law, even at the time it is enacted, is rarely meant to achieve one goal at the sacrifice of all others."[212] To ascertain the multiple and sometimes inconsistent purposes of the legislature, the Court is obliged to search for all the legislative ends—"the very issue that means-centered review is intended to avoid."[213] Moreover, as Linde trenchantly observes, laws sometimes express a legislature's "sense of the fitness of things" rather than "an instrumental aim."[214] In other words, if the legislature decides to prohibit females from practicing law owing to its sense of what ought to be, Linde would assert that the real issue is the legitimacy of the action taken—in this instance, the classification.[215]

I agree with Justice Linde that when the legislature asserts that its purpose is simply to achieve its sense of what ought to be, this objective is not necessarily impermissible. But government attorneys or some other appropriate surrogate for the legislature should be required to articulate what reasons support the legislature's sense of the fitness of a challenged discrimination.[216] If the government attorneys respond that the legislature has an antipathy towards females practicing law, the Court is entitled to ask what reasons have engendered antipathy towards females in this context. If, by chance, the government attorneys respond that the legislature reacted to

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206. Linde, *supra* note 2, at 212.

207. *Id.* at 201–15, 220–35, 251–55.

208. *Id.* at 204.

209. *Id.*

210. *Id.* at 205.

211. *Id.* at 212, 233–35. In Michael M. v. Superior Court of Sonoma County, 101 S. Ct. 1200 (1981), Justice Rehnquist writes:

> This Court has long recognized that "inquiries into congressional motives or purposes are a hazardous matter," and the search for an "actual" or "primary" purpose of a statute is likely to be elusive. Here, for example, [referring to gender based statutory rape law], individual legislators may have voted for the statute for a variety of reasons . . . .
>
> The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. And although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, "if it could not have been a goal of the legislation," this is not such a case.

Id. at 1204–05 (citations omitted).

212. Linde, *supra* note 2 at 208.

213. *Id.* at 209.

214. *Id.* at 211.

215. *Id.* at 212. Linde's article focuses on the rationality requirement of the Due Process Clause.

216. *See* text accompanying notes 49–58 *supra*.

pressures applied by the male legal fraternity, the plaintiff loses. The classification is closely related to the legislature's aim, and the plaintiff and others should endeavor to undo the legislature's favoritism by political action.

From the foregoing, it follows that the problem of ascertaining ends is ameliorated for purposes of a lawsuit if government attorneys or some other surrogate of the legislature is required by the Court to identify the ends and reasons—few or many—that they believe justify the challenged law. Moreover, the ends inquiry problem becomes more manageable if the Court requires the government to produce some evidence indicating the legislature at least thought about the rationale articulated by the attorneys. Linde, however, deprecates the suggestion that counsel should have the power to speak for the legislature. He asks rhetorically, "Is it not curious that the fate of an act of the legislature should hang on the capacity and willingness of the government's lawyer, and sometimes of a private party, to phrase the law's objectives so that neither they nor the chosen means are vulnerable to constitutional attack?"[217]

My response to Linde's question is this: The fate of an act of the legislature should not depend on the Court's willingness to participate in a sham. There is simply no reason why the Court should cover for the legislature's failure to think things out, nor is there a sound reason why courts should, on their own initiative, explain that a law enacted to serve the interests of pressure groups is a health-related or consumer protection measure. Therefore, a requirement compelling government attorneys to do their best[218] by explaining the rationale for the law's application to the plaintiff—while it may not necessarily promote candor in the government attorney's office—will promote candor on the Court.[219]

Linde is on firm ground, however, when he argues that the rationality requirement will not always be efficacious or applicable.[220] If the legislature desires to encourage or favor symphony orchestras because the lawmakers like music or musicians, the question becomes one of aesthetics.[221] In such

217. Linde, *supra* note 2, at 213.

218. "[A] main difficulty with reviewing laws for rationality is the problem of time; that is, the time at which the law must be a rational means to an end in order to be constitutional." *Id.* at 215. I would argue, contrary to Linde, that a law must be rational at the time it is enforced, *id.* at 216, and no one knows better than the law enforcement officers or those who administer the law why it is being enforced. The government attorneys therefore may speak for them.

219. When the traditional materials used for statutory construction are uninformative in cases not involving alleged racial discrimination, the Court ought to accept the government attorneys' articulation of the legislative goals. Otherwise the temptation to manipulate the conceivable legislative ends will often prove irresistible. Eisenstadt v. Baird, 405 U.S. 438 (1972), is a classic example of such manipulation. Of course, if the attorneys' representations are patently false, the Court need not accept their articulation of purposes at face value. *But see* Fiss, *supra* note 17, at 113: "This hypothesis seems to me to posit a somewhat naive conception of the state process. . . . [As a result], the stated-purpose requirement has not taken root, and probably should not be viewed as an important or permanent feature [of the rationality requirement]." Moreover, as noted in Michael M. v. Superior Court of Sonoma County, 101 S. Ct. 1200 (1981), the Court's cases "establish that the State's asserted reason for the enactment of a statute may be rejected 'if it could not have been a goal of the legislation.'" *Id.* at 1205 (citation omitted).

220. Linde, *supra* note 2, at 205.

221. *See also* Ely, *Legislation and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1230, 1247 (1970).

situations, a challenger usually cannot demonstrate through the introduction of *empirical* evidence that the classification is not related to aesthetics. Moreover, the legislature ordinarily ought to be permitted to further its conception of aesthetics one step at a time.

There are other traits that are morally or ethically, rather than instrumentally, relevant. It may be difficult to rationalize why, for example, those who advertise for hire have less of an ethical claim for an exemption from a traffic safety regulation than those who advertise their own goods.[222] Not all customs, mores, and folkways are instrumental, nor are they necessarily unconstitutional. Linde is correct, therefore, when he argues that there are unpragmatic, non-purposive values not amenable to the model of the rationality requirement,[223] but neither he nor the Court should throw out the baby with the bath water by ignoring the rationality requirement in those cases in which it is surely applicable.

My argument is based on the premise that the challenger in an equal protection case should have his or her day in court. The rationality requirement should be reconsidered in order not to make that day a futile ritual. The plaintiff must, of course, claim that the government's distinction is disadvantageous and that he or she falls on the disadvantaged side of the line. The government should move to dismiss if it can argue that the rationality requirement is inapplicable because the line drawn is the inevitable result of random choice or bias. The pure issue of law presented by the pleadings would be whether, under the facts and circumstances, the legislature is entitled to be arbitrary. Such cases can be imagined. In a related vein, Ely has noted that the "promotion of 'good taste' . . . cannot be evaluated by a calculus of 'rationality' and 'irrationality.' "[224] The Court, accordingly, should grant the government's motion to dismiss if it is convinced that the line drawn simply reflects the legislature's partiality and is not amenable to evaluation by a rationality test.

There are other cases where the state of the art is too primitive to support a legislative judgment with empirical data. Decision making must therefore depend to a great extent upon policy judgments and less upon purely factual analysis. In situations involving, for example, "the frontiers of scientific

222. *Cf.* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). "[T]here is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price." *Id.* at 116 (Jackson, J., concurring). In Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981), a city ordinance that was challenged on the grounds that it abridged freedom of speech survived judicial scrutiny. The Court held that restrictions that distinguished between an owner's on-site billboard advertising and other, more distracting billboard advertising directly advanced the city's interests in aesthetics and traffic safety. *Id.* at 2899.

223. Linde, *supra* note 2, at 221. To say, as Justice White did recently, that a property owner has a stronger interest in on-site advertising, as opposed to off-site advertising, is unconvincing, *see* Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2895 (1981); to say on-site advertising is morally less objectionable, however, places the issue in its proper analytical framework.

224. Ely, *Legislation and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1237 (1970).

knowledge,"[225] the government should "so state and go on to identify the considerations [it finds] persuasive."[226] If the Court is convinced that the policy issue is purely discretionary and the exercise of discretion is within the power of the government, the challenger loses.[227] Moreover, when the legislature is allocating scarce resources and budget cuts have to be made, it may be more or less sympathetic towards some programs. Legislators may not be able to articulate their reasons beyond instinctual urges. Representatives may favor some programs and have antipathy towards others for no reason other than notions that the favored programs redound more to their intuitive conception of a proper governmental role. The rationality requirement is inapplicable under such circumstances. The remedy, if any, must be political and not judicial. There are many other situations where a relatively vigorous, means-focused rationality requirement is inapplicable.

Fritz[228] is an example of how unhelpful the Supreme Court's current approach is. The classification assailed by *Fritz* was the brainchild of a commission.[229] The members of this commission were not appointed by public officials, nor did they represent the interests of the challengers who were no longer active railroaders or union members.[230] The classification upheld by the Court was arguably not closely related to the stated purpose of Congress—to establish equitable retirement benefits for *all* railroad employees[231]—and nothing in the record indicates Congress gave any thought to the line drawn by the commission.[232] Nevertheless, the Court presumed that Congress made a rational policy judgment based on the time bound line drawn by the commission.[233] The Court simply assumed that Congress drew the line excluding individuals with many years of railroad service on the premise that they were not "among the class of persons who pursue careers in the railroad industry,"[234] an assumption that was based solely on their lack of affiliation with the railroad in 1974 or thereafter. If Congress made any judgment at all, it was not a rational one in the instrumental sense. It therefore appears that the Court bailed Congress out of this botched job by supplying the government with a figleaf that disguised the legislature's thoughtlessness.

Individuals and classes protected by the Equal Protection Clause deserve more candor. Justice Rehnquist could have explained in his opinion in *Fritz* that his premise was based solely on the representations of government attorneys. If nothing else, this publicity in the United States Reports will cause government attorneys to think twice about making representations to

225, AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).
226. *Id.* at 476.
227. *Accord,* Marshall v. United States, 414 U.S. 417, 428 (1974).
228. 449 U.S. 166 (1980).
229. *Id.* at 189–93 (Brennan, J., dissenting).
230. *Id.*
231. *Id.* at 169 n.2.
232. *Id.* at 191–93 (Brennan, J., dissenting).
233. *Id.* at 460–61.
234. *Id.* at 461.

the Court that are not only figleaves, but also figments of their imaginations and obstructions of justice. Nor would it be an intrusive interference with congressional prerogatives for the courts to require evidence that the rationale proffered by government attorneys was actually considered by Congress. If such evidence is not forthcoming, the classification could be deemed arbitrary, not because the Court disagrees with the wisdom of the classification, but because Congress inadvertently enacted a law that does not reflect reasoned judgment. *That* is what the rationality requirement is all about.[235] It is not a cure-all, nor should it be a placebo. It should protect persons and classes from arbitrary, disadvantageous distinctions without disabling the government from acting in an area in which it has power to act.

CONCLUSION

The Equal Protection Clause protects all persons and classes, and the rationality requirement, whenever applicable, should be applied with relatively vigorous means-focused scrutiny. Meaningful judicial scrutiny is unlikely to occur if the Court continues to scan the universe for imaginary ends in order to avoid (1) the difficulties of ends scrutiny, and (2) the political problems which would ensue if it held invalid the numerous laws that are enacted owing to favoritism and antipathy.

Recent signals from four of the Justices indicate that the legislature's articulated, if not its actual, purpose, rather than judicial hypothesizing, will count.[236] This is a welcome development. The rationality requirement is a test that cannot function well if the Court does not, to the extent feasible, require a showing that the legislative body (1) was aware of what action it took, (2) intended to take *that* action in the sense of envisaging it, and (3) wanted the action to be taken either for its own sake or for the sake of achieving some stated objective, or both.[237] The Equal Protection Clause cannot fulfill its promise of reducing the risk of arbitrary classifications unless the Court analyzes the manifestations, if any, of the legislature's selective attention towards the probable effects of its classification.

Although several Justices appear to be reconsidering the desirability of the Gunther model as a useful judicial technique in a wider range of cases, the majority still often acts as if it were following Justice Linde's advice to abandon

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235. *See* Gunther, *supra* note 49, at 20: "Stated most simply, it would have the Court take seriously a constiutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends."

236. For Gunther's discussion of 1980 Term equal protection cases with a focus on the divisions among the Justices concerning actual, articulated and hypothesized ends, *see* G. GUNTHER, CONSTITUTIONAL LAW AND INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW: CASES AND MATERIALS 53–72 (10th ed. Supp. 1981).

237. For a similar methodological model bearing on the way moral judgments, in general, are connected with action, *see* A. GEWIRTH, REASON AND MORALITY 37–42 (1978).

the rationality requirement. For example, in *Fritz*, Justice Rehnquist seemed unconcerned with whether *his* justification for the legislative line drawing in fact influenced an indifferent Congress.[238] To the extent that the Court has not found the key to the halfway house between excessive deference and unwarranted interference with legislative discretion, it continues to deny many people the equal protection of the laws. When the government uses classifications, the public is entitled to a reasoned explanation justifying the discrimination.

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238. 449 U.S. 166, 166–79 (1980).